No. 88-111

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JAMES W. AUSTIN, CARL E. YORK, JR., and
RICHARD F. LERT, Trustees of the
Ariana A. Fairbanks Trust Dated
April 28, 1978,
ROBERT O. BULLARD, JR., and CARL E. YORK, JR.
Successor Trustees of the
1976 Austin Revocable Trust
Dated December 11, 1976,

Petitioners,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent City and County of Honolulu (hereinafter referred to as "City") believes that the sole question presented to the Court for review is whether the Petitioners (hereinafter referred to as "Austins") satisfactorily proved to the Ninth Circuit Court of Appeals that existing State procedures are unavailable or inadequate to address their concerns.

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RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The City disagrees with the statement of facts presented by the Austins in their Petition, especially as it relates to: 1) their mischaracterization of the law of inverse condemnation in Hawaii; 2) the alleged "scheme" to acquire the Austins' property; and 3) their allegation that the Ninth Circuit *sua sponte* dismissed the action on appeal.

1. Mischaracterization of Hawaii Law.

The City believes that the Austins' Petition mischaracterizes the law in Hawaii as expressly not allowing monetary damages in inverse condemnation actions. Despite the Austins' arguments, the fact is that there are no cases in Hawaii that expressly state that monetary damages are not allowed in inverse condemnation cases brought under either the Unites States or Hawaii State Constitutions. The City will further clarify Hawaii law as it relates to inverse condemnation actions in its argument rather than in the statement of the case.

2. Basic Facts of this Action.

Secondly, the City believes the Austins' statement unfairly characterized the facts of this case as a "scheme to acquire the Austins' property." At no time has it been found or alleged that the City had a "scheme" to acquire the Austins' property. The City does agree, however, that the Austins are the owners of a parcel of land located within the Downtown district that is affected by a street widening setback. This setback was established by ordinance in 1968. At that time located on the property was a building which housed various businesses, including the "old" Liberty House Store, which generated substantial income for the Austins. This building was already located within the setback area but was deemed a "nonconforming" structure and hence its use was allowed to continue, despite the setback designation. The Austins and the other property owners on that block had always envisioned developing the entire block into a "superblock" with buildings for offices, stores, and residential use. To accomplish this purpose the Austins attempted to lobby the City Council to either *amend* the law designating the setback on the property or to purchase the setback area. The Austins, after private and public meetings with various members of the City Council, were able to have the City Council "request" the City Administration to provide for the acquisition of the setback area. The Council, how-

ever, decided not to amend the law to delete the setback area. The City Administration, while not objecting to the concept of acquiring the setback area, could not commit to purchasing the setback within a definite time period due to budgetary constraints and other public works projects that had a higher priority, such as pollution and environmental control projects. Because of this conflict between the City Administration and the City Council, the Austins filed an action in the United States District Court for the District of Hawaii to force the City to purchase the setback area by alleging that the City "took" their property in violation of the Fifth and Fourteenth Amendment. The City denied the allegations in the complaint, stating that the Austins' property was not taken and that the Austins were not deprived of all economic use of their property.

Currently, the Austins are leasing their entire property, including the setback area, to Liberty House, Inc. The Lease to Liberty House, Inc. grants to Liberty House *exclusive* control and use of the entire "Store Apartment" together with the outside setback areas which, under the development documents, constitutes common elements of the complex. This lease generates substantial revenue to the Austins which has been increasing annually. As testified by the Austins' witness, this lease, as negotiated, satisfied the Austins' expectations in maintaining at least the same income flow it received from the "old" Liberty House building that was located within the setback area.

3. Circuit Court did not *Sua Sponte* Dismiss the Austins' Case.

Lastly, the City disagrees with the Austins' false assertion that the Ninth Circuit *sua sponte* dismissed their case against the City. The record shows that the City expressly argued the issue of ripeness before the District Court as part of its motion to dismiss or summary judgment. Transcript of proceedings at 1031. The District Court denied the City's motion and the City appealed, alleging among other matters, that the case was not ripe for adjudication based on this

Court's reasoning in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d. 126 (1985).

REASONS FOR DENYING THE WRIT

I.

THE AUSTINS' PETITION FOR CERTIORARI FAILS TO PRESENT ANY SUBSTANTIAL OR IMPORTANT REASONS FOR REVIEW OF THE CIRCUIT COURT'S DECISION

Rule 17.1 of the Rules of the Supreme Court of the United States provides that a "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." While the rule does not specifically address what constitutes "special and important" reasons to support a writ of certiorari, the rule does provide some guidelines to indicate the "character of the reasons that will be considered" by the Court. These guidelines include:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision;
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals;

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of the above reasons, however, are present in the Austins' Petition filed with this Court.

A. The Ninth Circuit Court's Decision Does Not Conflict With Other Decisions In The Ninth Or Other Circuits.

The Austins assert that the Ninth Circuit Court's decision in this matter conflicts with the decisions rendered by other federal court of appeals. In support of this assertion the Austins refer this Court to the Eleventh Circuit's decision in *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514 (11th Cir. 1987). *Corn,* however, is not applicable to the facts of this case. In *Corn* the court of appeals held that the plaintiff's claim was ripe for adjudication despite the fact that no attempt was made to obtain compensation in the Florida courts. The court's ruling, however, was based on the fact that the Florida court had unequivocally stated that inverse condemnation actions are not allowed in the state courts. *Id.* at 1519. *See also Furey v. City of Sacramento,* 780 F.2d 1448 (9th Cir. 1986). In this case, however, no such holding has been reached by any Hawaii court excluding payment of just compensation through inverse condemnation actions and the Austins have failed to cite any case that has reached such a holding. Despite the Austins' assertion to the contrary, there are no federal cases that have held that a state remedy was "unavailable or inadequate" merely because the state law on inverse condemnation was unsettled. Only when a state has unequivocally held that state law provides no right to an inverse condemnation claim will the courts question the availability or adequacy of the state remedies. This, however, is not the case here.

Finally, the Austins allege that the Ninth Circuit Court's decision conflicts with its prior rulings in *Norco Construction, Inc. v. King County,* 801 F.2d 1143 (9th Cir. 1986); *McMillan v. Goleta Water District,* 792 F.2d 1453 (9th Cir. 1986), *cert. denied*---- U.S. ----, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987); and *Martino v. Santa Clara Valley Water District,* 703 F.2d 1141 (9th Cir.), *cert. denied* 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983). A review of these decisions does not support the Austins' position. In *Norco* the Ninth Circuit's remanding of the case resulted not from a finding that the state law was unclear, but because "[n]either party in this case has discussed whether Washington law provides such relief." *Norco Construction, Inc. v. King County,* 801 F.2d. at 1146. In this case the adequacy and availability of state remedies were thoroughly discussed and briefed before the Ninth Circuit by the parties. Likewise, the Ninth Circuit's decisions in *McMillan* and *Martino* also do not conflict with the decision reached in this case. In *McMillan* the court did not address the issue whether the plaintiffs' claim was ripe for adjudication. The only issue addressed by the *McMillan* court in the portion cited by the Austins was whether the lower court erred in refusing to abstain from hearing the case. This issue is separate and distinct from the issue whether the court has jurisdiction to even hear the case on the basis of ripeness. Abstention is a discretionary function of the court whereas, if the court lacks jurisdiction on the basis of ripeness, the case must be dismissed. This was the finding of the Ninth Circuit in this case and the court's reasoning in *McMillan* does not change this rule. Lastly, the Ninth Circuit's decision in *Martino* also does not conflict with this case. *Martino* was a case decided by the Ninth Circuit prior to the guidelines set forth in *Williamson* and did not address the question of whether adequate state remedies were available to the plaintiff, but only whether a development plan was necessary before a claim for inverse condemnation could be filed. In this case, however, the Ninth Circuit did not dismiss the Austins' claim because of their failure to file a development plan, but

because they failed to avail themselves of the available state remedies.

B. No Important Question Of Federal Law Was Decided By The Ninth Circuit Nor Did The Ninth Circuit's Decision In Any Way Conflict With The Decisions Of This Court.

It is the position of the City that no important question of federal law is implicated by the Ninth Circuit's decision that the procedures available in Hawaii are facially adequate. In addition the City believes that the Ninth Circuit's decision is consistent and does not in any way conflict with the decisions rendered by this Court.

1. The decision by the Ninth Circuit only involves the interpretation and application of state law.

It is generally recognized that the determination of state law by the federal courts is not sufficient in and of itself to support a writ of certiorari. *See Haring v. Prosise,* 462 U.S. 306, 314 n.8, 103 S.Ct. 2368, 2373 n.8, 76 L.Ed.2d 595, 604 n.8 (1983); *Butner v. United States,* 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); *Commissioner v. Bosch's Estate,* 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967); *Pierson v. Ray,* 386 U.S. 547, 558 n.12, 87 S.Ct. 1213. 1220 n.12, 18 L.Ed.2d 288, 297n.12 (1967). *See also* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036, p. 41 (2d Ed. 1988) and the cases cited therein. For example in *Haring* the petitioner, among other matters, challenged the court of appeals' dismissal of a pendent state claim to the Supreme Court. As to this challenge, the Supreme Court stated: "[w]e do not ordinarily review the holding of a court of appeal on a matter of state law, and we find no reason for departing from that tradition in this case." *Haring v. Prosise,* 462 U.S. at 314 n.8, 103 S.Ct. at 2373 n.8, 76 L.Ed.2d at 604 n.8. Likewise, in *Bosch's Estate,* one of the points raised

by the petitioner to the Supreme Court concerned the propriety of the court of appeal's application of the state's proration statute. The Supreme Court rejected this challenge on the basis that "[w]hile we did not limit the grant of certiorari, we affirm without discussion the holding of the Court of Appeals on the point. The issue presents solely a question of state law and we ordinarily accept such rulings." *Commissioner v. Bosch's Estate,* 387 U.S. at 456, 87 S.Ct. at 1776, 18 L.Ed.2d at 892. As discussed by the Court, this rule arises from the understanding that "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 500, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394, 403 (1985). Furthermore, unless the state law determination by the court of appeals is unreasonable or clearly erroneous the court's ruling should be upheld. For example in *U.S. v. Durham Lumber Co.,* 363 U.S. 522, 80 S.Ct. 1282, 4 L.Ed.2d 1371 (1960), an appeal was filed contesting the court of appeals' interpretation of an unclear state law. The Court affirmed the court of appeals decision, reasoning:

> It is suggested that the courts of North Carolina have never specifically described the nature of the property rights created by the North Carolina statutes involved in this case, and that the Court of Appeals' interpretation of those statutes is probably incorrect. However, where '[t]he precise issue of state law involved . . . is one which has not been decided by the . . . [state] courts,' this Court has said that, '[i]n dealing with issues of state law that enter into judgments of federal courts we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.' Since the Court of Appeals is much closer to North Carolina law than we are, and since we cannot say that the court's characterization of the taxpayers' property interest under that

> law is clearly erroneous or unreasonable, the judgment is Affirmed.

Id. at 526-27, 80 S.Ct. at 1284-85, 4 L.Ed.2d at 1374 (citation omitted). In this case it cannot be said that the Ninth Circuit's decision is "unreasonable." The Austins have not cited to any case or decision by the Hawaii courts that preclude them from filing an action for relief in the state courts. Likewise, as pointed out by the Ninth Circuit, the Austins have not shown why they are prohibited from utilizing existing statutory procedures to enforce their so-called "agreement" to purchase. Appendix A at 7a-8a. In fact, the City has indicated its willingness to stipulate to the joinder of the Austins as a plaintiff in the state inverse condemnation action filed by its co-developer Campbell Estate. In addition the state courts have also allowed the plaintiffs in that case to further amend their complaint to include common law and statutory contract claims recognized in Hawaii. Thus, despite the Austins' assertion, it appears that the Ninth Circuit's determination that the state procedures were both available and adequate was reasonable.

The Austins attempt to show that the Ninth Circuit acted unreasonably by arguing that the court failed to examine the local law and determine whether the state compensation procedures were "reasonable, certain, and adequate" at the time of the taking. The record in this case and the Ninth Circuit's decision do not lend credence to this assertion. As the record shows, the Ninth Circuit determined after thorough discussions and briefs were presented to it by the parties that the matter was not ripe since the Austins failed to establish "that state remedies are inadequate." Appendix A at 7a-8a. Contrary to the Austins' assertion the Ninth Circuit did in fact review all the relevant state cases, applicable state constitutional provisions, and relevant statutory provisions presented to it by the parties. In fact, it was this review that led to the court's conclusion that the Austins had not shown they could not seek compensation under the state constitutional provisions or any applicable statute. Appen-

dix A at 7a-8a. Furthermore, the court also noted that Hawaii, unlike Florida and California, had not definitively ruled that monetary damages are unavailable in inverse condemnation claims.

The determination by the Ninth Circuit that the Hawaii law regarding inverse condemnation is sufficiently adequate and available to render a claim not ripe for adjudication is consistent with the view taken by Judge King of the Hawaii District Court in *Kaiser Development Co. v. City and County of Honolulu,* 649 F. Supp. 926 (D. Haw. 1986), and is supported by decisions in other circuits. In *Kaiser* the court dismissed an inverse condemnation claim filed by a developer and a landowner against the City. As set forth in the court's decision, one of the bases for the court's dismissal was that the plaintiff's claim was not ripe for adjudication under the guidelines set forth in *Williamson.* The court stated:

> The City also asserts that Kaiser has not met the second prong of the *Williamson County* finality doctrine. That is, Kaiser has not tried to use state procedures to obtain just compensation or shown that such procedures are unavailable or inadequate.
>
> On this issue, plaintiffs argue, citing *Allen v. City and County of Honolulu,* 58 Hawaii 432, 571 P.2d 328 (1977), that Hawaii does not allow damages for inverse condemnation. However, *Allen* concerned compensation for zoning estoppel and not regulatory takings. While *Allen* indicates that the state court might generally look on damages for development costs with disfavor, it does not necessarily preclude compensation for Bishop's and Kaiser's claims. Accordingly, until the state has denied them compensation, or until plaintiffs otherwise demonstrate that state compensation is un-

> available or inadequate, plaintiffs' claims are not ripe for review by a federal court in a takings action.

Id. at 942 (citation omitted).

Furthermore, the conclusion reached by the Ninth Circuit and Judge King is consistent with the decisions rendered by the First and Eighth Circuit in *Culebras Enterprises Corp. v. Rivera Rios,* 813 F.2d 506 (1st Cir. 1987), and *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986). In *Culebras* the First Circuit held that the plaintiffs' claim was not ripe for adjudication since they had not availed themselves of the available state remedies even though the court noted that there were no statutes authorizing inverse condemnation claims or any case awarding any damages for inverse condemnation. *Culebras Enterprises Corp. v. Rivera Rios,* 813 F.2d at 513. In response to the plaintiffs' claim that the state remedy, even if available, was not "certain or adequate" the court stated:

> A more serious objection to Puerto Rico's inverse condemnation remedy is that it has not been fully spelled out by the Supreme Court of Puerto Rico and its implications for the present situation are thus unclear. It may or may not turn out to be less 'certain and adequate' than *Williamson* requires. Lack of clarity is not unusual, however, when legal rights are still in process of definition through case-by-case adjudication. The Puerto Rico high court has at least discussed, and has seemingly signalled, the existence of an inverse condemnation remedy. In her concurrence in *Hudson v. Palmer,* Justice O'Connor stated that in order to prevail on a damages claim for an alleged deprivation of due process or taking without just compensation, 'the claimant must either avail himself of the remedies guaranteed by state law or prove that the remedies are inadequate.' Plaintiffs have certainly not proven the inadequacy of the Commonwealth's inverse

> condemnation remedy. We think they must pursue that remedy before they can maintain a federal damages claim, since, when fleshed out by the local court, that remedy could well provide the 'certain and adequate' relief they seek.

Id. at 514-15 (citation omitted). Similarly, in *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986), the Eight Circuit held that a claim was not ripe for adjudication since the plaintiffs had not shown that they have been denied compensation from the state. The court stated:

> Appellants also did not seek compensation from the state. Appellants argue that the decision of the Minnesota Supreme Court in *McShane v. City of Faribault*... bars an inverse condemnation action. The *McShane* court stated that 'every regulation challenged as a taking [does not give] rise to an action for inverse condemnation. Only where the taking or damage is irreversible would an injunction against enforcement not provide an adequate remedy'. The Minnesota Supreme Court limits 'the use of inverse condemnation to cases where an injunction would not restore plaintiffs to their original status.' Our review of the court's holding in *McShane* convinces us that an inverse condemnation action may be available to appellants. *Until the Minnesota courts have ruled that an inverse condemnation action may not be brought or denies damages in such an action, appellants' claim of taking without just compensation is not ripe for decision by a federal court.*

Id. at 609 (citation omitted)(emphasis added). The position taken by the court in *Littlefield* is exactly the same position taken by the Ninth Circuit in this case. In *Littlefield* the Minnesota state courts, while favoring injunctions as a remedy in inverse condemnation cases, had not absolutely stated that damages *cannot* be awarded in every case. Similarly, the courts here in Hawaii have also indicated that in

regard to equitable estoppel zoning cases, an injunctive remedy should first be considered. Furthermore, Hawaii, like Minnesota and Puerto Rico, has not absolutely ruled that claims for inverse condemnation in any situation will not be allowed.

Based on the above, it is clear that the Ninth Circuit's interpretation and determination of state law in this case does not involve an important federal question. The Ninth Circuit is more familiar with and schooled in the law of Hawaii and its determination should not be disturbed unless clearly unreasonable. In this case the Ninth Circuit's decision was not unreasonable since it is consistent with the decision and reasoning enunciated by other courts within the District of Hawaii and both the First and Eighth Circuit Courts of Appeals. Unless the Austins can satisfy their burden that the remedies in the state are either unavailable or inadequate, the Ninth Circuit properly found that the matter was not ripe for adjudication.

II.

THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS IN HOLDING THE AUSTINS' CLAIM WAS NOT RIPE FOR ADJUDICATION

This Court has made it clear that a regulatory "taking" claim is not ripe for adjudication unless the claimant has first obtained a final decision regarding the application of the zoning ordinance to the subject property and has utilized the existing state procedures to obtain compensation. *See generally MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285, *reh'g denied* ---- U.S. ----, 107 S.Ct. 22, 92 L.Ed.2d 773 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In this case the Ninth Circuit Court of Appeals ruled that the Austins' claim was not ripe for adjudication since the Austins failed to seek compensation through adequate state remedies. The Austins disputed this holding and petitioned this Court for certiorari on the basis that the Ninth Circuit has improperly extended the requirements set forth in *Williamson* to cases where there are no adequate state remedies. A review of this Court's decisions indicate that the Ninth Circuit's decision is correct.

In *Williamson* this Court held that in order for a "taking" claim to be ripe for adjudication the plaintiff must show that a "final" decision regarding the use and development of the property in question has been rendered and that the plaintiff has no adequate state remedy. The Ninth Circuit, in dismissing the Austins' claim, found that the Austins have not availed themselves of the available state remedies or shown that the state procedures are not available or inadequate. In this regard the Ninth Circuit placed the burden on the Austins to show the unavailability or inadequacy of the state remedies. This position is consistent with this Court's determination in both *Williamson County Re-*

gional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 196-97, 105 S.Ct. 3108, 3122, 87 L.Ed.2d 126, 145 (1986)("Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate and until it has utilized that procedure, its taking claim is premature"), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285, 294 (1986) ("appellant must demonstrate that any proferred compensation is not 'just.'").

The only attempt made by the Austins to meet this burden is their citation to miscellaneous cases dealing with eminent domain and zoning estoppel cases. None of these cases, however, are directly on point and none of these cases held that claims for inverse condemnation are unavailable in Hawaii. At most the cases cited by the Austins indicate that the law in Hawaii is unsettled. This, however, is not enough to prove that there are no procedures available in Hawaii or that they are inadequate. In addition, the Austins cite to a myriad of cases that relate to the longstanding controversy in Hawaii dealing with water rights within the state. These cases, however, have no bearing on this matter. The Austins attempt to use these water rights cases to show that the Hawaii courts are hostile to taking claims. Aside from the fact that these cases don't even address the issue of compensation, these cases deal primarily with the issue of Hawaiian water rights that are grounded in ancient Hawaiian practices and culture rather than the United States Constitution and cannot be equated. *See* Judge Pence's discussion in *Robinson v. Ariyoshi*, 441 F. Supp. 559, 564 (D. Haw. 1977), in which he recognized the "long established and unique principles of Hawaiian water law," adopting Justice Levinson's analysis in his dissent in *McBryde Sugar Co. v. Robinson*, 55 Hawaii 260, 270-76, 571 P.2d 26, 32-35 (1973). In their Petition the Austins also attempt to use these water rights cases to show that the Hawaii courts will not allow a taking claim because of the doctrine of sovereign immunity. To this extent the Austins cite to a footnote contained in the

Hawaii Supreme Court's decision in *Robinson v. Ariyoshi*, 65 Hawaii 641, 658 n.13, 658 P.2d 287, 300 n.13 (1982). The Austins, however, severely misconstrue this footnote. First, the court's opinion in that case dealt with the limited question whether judicial action could be the basis for a claim against the state. Secondly, the court's opinion, rather than stand for the proposition that the doctrine of sovereign immunity protects the state from constitutional claims, clearly states that this doctrine has no effect when constitutional claims are raised against the state. Taken in its entirety, none of the state cases cited by the Austins are relevant and directly address the pertinent issues in this case.

Alternatively, the Austins also argue that no matter what remedies are available in Hawaii, they are inapplicable. In particular the Austins argue that Hawaii Revised Statutes (hereinafter referred to as "HRS") Section 101-3, relating to procedures concerning agreements by the government and landowners to purchase property in lieu of formal condemnation proceedings, does not apply to them. Appendix B at 11a. This response, however, avoids the issue whether there are *facially adequate* procedures that might have afforded the Austins just compensation. Whether the Austins met the requirements of the statute to obtain and enforce such an agreement is not relevant. The State, by way of HRS Section 101-3, has set forth an adequate procedure to follow in order reach an agreement to purchase land in lieu of formal condemnation proceedings. *See* Appendix B at 11a. This procedure, if followed, is adequate and will afford a party just compensation through the enforcement procedures described therein. As such, this procedure, provided by the State, is clearly facially adequate as required by *Williamson* and *MacDonald*.

Finally, the Austins attempt to excuse their disregard for the state procedures by arguing that this case concerns a non-regulatory or an oppressive conduct type of taking rather than a regulatory taking. This characterization of their claim, however, is false. What the Austins have conveniently ignored in this matter is the fact that it was the

Comprehensive Zoning Code of the City and County of Honolulu (CZC) and not the City Council's action that prevented them from building within the designated setback lines. Perhaps one reason why the Austins have consistently ingored this fact is because the CZC is also the governing ordinance that would have allowed them to build within the setback if they applied for a variance with the Zoning Board of Appeals (ZBA) which was the proper City agency. As set forth in the the City Charter, the ZBA is entitled to grant a variance to a landowner upon showing that the landowner would be deprived of the reasonable use of his land or building, the variance is due to the unique circumstances of the landowner, and the variance will not alter the essential character of the locality. Appendix C at 12a. If the Austins were really serious about building within this small setback area, they could have easily applied for a variance and have their request determined as allowed by the City Charter. The ignoring of the CZC is consistent with the Austins' practice of using informal lobbying efforts to accomplish their goals rather than follow the established procedures. The only reason the Austins give for their failure to utilize these formal and established procedures is that nobody told them they could go to the ZBA. This reason is strange in light of the fact that this was a multi-million dollar project, employing architects, lawyers, developers, engineers, and other professionals who presumably were skilled and knowledgable in the area of real estate development. It is not for the City to provide them with legal assistance to inform them how to develop their property. This is a regulatory case and the Austins' disregard or failure to follow these regulations and the procedures provided therein does not otherwise change this fact.

III.

THE AUSTINS' ARGUMENTS CONCERNING ALTERNATIVE RULINGS BY THE NINTH CIRCUIT ARE INAPPLICABLE

The Austins' argument that the Ninth Circuit erred in failing to invoke the doctrine of abstention, remand the case back to the district court, or certify questions to the Hawaii Supreme Court is without merit. As this Court has consistently held, if a claim is not ripe for adjudication, the court lacks jurisdiction in the case. *See* this Court's ruling in *MacDonald* and *Williamson* in which the plaintiffs' cases were dismissed as a result of the Court's ruling. This fact was clearly recognized by the Ninth Circuit when it stated that, "[u]nless a claim is ripe, we do not have jurisdiction to hear it." Appendix A at 9a. Since the court had no jurisdiction over the case, it likewise had no jurisdiction to issue any valid order or other remedy in this case. Therefore, the Austins' request for other remedies or orders is misplaced and could not have been granted by the Ninth Circuit. The Ninth Circuit did not err in denying the Austins' alternative remedies.

CONCLUSION

The Ninth Circuit properly held that the Austins' claims were not ripe for adjudication since they had not shown that the state remedies were inadequate or unavailable. At most the cases cited by the Austins indicate the still developing nature of Hawaii law concerning inverse condemnation. Other courts of appeals, however, have consistently held that the mere uncertainty of the law in a state does not render a claim ripe for adjudication under the guidelines set forth in *Williamson* and *MacDonald*. This court has consistently refused to review matters of state law electing instead to defer to the lower courts who are better skilled and schooled in the laws within their state. In this case both the Ninth Circuit and Judge King of the Hawaii District Court,

after reviewing the law in Hawaii, have agreed that there is no showing that the remedies in Hawaii are unavailable or inadequate. Lastly, the Austins should not be permitted to avoid the established procedures available in Hawaii and the City Charter to obtain relief in favor of their own informal lobbying efforts. The mere failure of lobbying efforts does not render a claim ripe for adjudication until the Austins avail themselves of the formal relief available in Hawaii. The City therefore respectfully requests this Court to deny the Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, August 18, 1988.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES W. AUSTIN; CARL E. YORK, JR.; RICHARD F. LERT, Trustees of the Ariana A. Fairbanks Trust dated April 28, 1978; ROBERT O. BULLARD, JR.; CARL E. YORK, JR., Successor Trustees of the 1976 Austin Revocable Trust dated December 11, 1976,

Plaintiffs-Appellees, Cross-Appellants,

v.

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellant, Cross-Appellee.

Nos. 87-1540; 87-1571

D.C. No. CV 84-0035-HMF

OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Argued November 2, 1987—Honolulu, Hawaii
Submitted December 3, 1987*

Filed February 24, 1988

Before: James R. Browning, Chief Judge, Eugene A. Wright, and Edward Leavy, Circuit Judges.

*The case was submitted after the parties filed supplemental briefs requested by the panel.

Opinion by Judge Wright

SUMMARY

Real Property/Constitutional Law

Appeal from judgment finding that city took a setback by its actions. Vacated. The court held that until the party pursues unsuccessfully compensation in the state courts or those courts established that the party may not recover compensation through inverse condemnation procedures, the claim is not ripe.

Appellee Austin owns land on King Street in Honolulu. Appellant Honolulu's Development Plan envisions widening the street and designates a 20-foot setback. Rather than seek a variance to build a store, Austin indicated that he was willing to sell the setback area to the city. Partially relying on his understanding that the city had committed itself to purchasing the land, he began construction in compliance with the setback requirement. The city then told him that it would not begin the street widening for several years and would not acquire the setback until then. Austin sued in district court alleging that the city's actions effected a taking for which it must pay just compensation. The court concluded that the city took the setback by its actions.

[1] A court cannot consider an alleged taking by regulation without a final and authoritative determination of the type and intensity of development legally permitted. Such a determination consists of a rejected development plan and denial of a variance. [2] To establish that the state failed to offer just compensation, a landowner must seek and be denied compensation through state procedures. [3] Austin did not seek a variance or compensation. [4] Inverse condemnation actions are not ripe for review in federal court until the plaintiff

establishes that the state failed to remedy the alleged violation. [5] Until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances, Hawaii procedures are adequate. [6] Because he retains the right to exclude others, he has not suffered a physical taking.

COUNSEL

Jonathan Chun, Deputy Corporation Counsel, Honolulu, Hawaii, for the defendant-appellant/cross-appellee.

Ke-ching Ning, Green, Ning, Lilly & Jones, Honolulu, Hawaii, for the plaintiffs-appellees/cross-appellants.

OPINION

WRIGHT, Circuit Judge:

In this case we consider whether the Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) concerning inverse condemnation and ripeness, applies in cases in which state remedies available to the claimant are uncertain and undeveloped. We conclude that it does. Until Austin pursues unsuccessfully compensation in the state courts or those courts establish that he may not recover compensation through inverse condemnation procedures, his claim is not ripe for federal court review.

BACKGROUND

Austin owns 16,339 square feet of land on King Street in downtown Honolulu. His lot is subject to the "Development Plan for the Central Business District of Honolulu." The

Plan, adopted in 1969, envisions widening King Street and designates a 20-foot setback. The Comprehensive Zoning Code of the city prohibits new structures within the setback. The city intends to acquire setback land by eminent domain once it begins to widen the street.

Until December 1978, Austin maintained a nonconforming commercial building that extended into the setback area. In 1978 he demolished the structure to build a store for Liberty House, a retail establishment. The City Planning Department rejected the plans for the store because the building would have occupied the setback in violation of the zoning ordinance. Rather than seek a variance, Austin communicated with the City Council, indicating that he was willing to amend his building plans and sell the setback area to the city.

Although the city refused initially to acquire the land, eventually the City Council began to negotiate with Austin to buy the setback. Relying on the progress of these negotiations and his understanding that the city had committed itself to purchasing the land, he renegotiated the lease with Liberty House to account for the reduction in floor space, and began construction in compliance with the setback requirement and the zoning code.

In September 1980, the city told Austin that it would not begin the street widening project for several years and would not acquire the setback until then. Austin sued in federal district court alleging that the city's actions effected a taking for which it must pay just compensation.

That court concluded that the city took the setback by the Council's actions. It rejected the city's argument that Austin should have sought a variance before his federal action, concluding that once the taking occurred, Austin could do nothing more to protect his interest. The city appealed.

ANALYSIS

We review *de novo* the court's conclusions of law. *United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) *cert. denied,* 469 U.S. 824 (1984).

[1] To prevail in an inverse condemnation action the landowner must establish that the regulation or state action effects a taking, that it "goes too far," and that he or she has not received just compensation. *MacDonald, Sommer & Frates v. Yolo County,* 106 S. Ct. 2561, 2566 (1986).[1] Because the finding that a regulation effects a taking turns on how the regulation restricts the land, a court cannot consider an alleged taking by regulation without "a final and authoritative determination of the type and intensity of development legally permitted." *Id.* Such a final determination consists of two elements, a rejected development plan and denial of a variance. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186-88 (1985); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo County,* 830 F.2d 977, 980 (9th Cir. 1987).

[2] To establish that the state failed to offer just compensation, a landowner must seek and be denied compensation through state procedures, including an inverse condemnation action in state court, provided those procedures are adequate. *Williamson County,* 473 U.S. at 195. The Supreme Court explained:

> because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking.

[1]Unlike *Herrington v. County of Sonoma,* Nos. 87-2620, 86-2728, slip op. (9th Cir. Dec. 24, 1987), Austin's only claim is for inverse condemnation.

473 U.S. at 195; *see also Cassettari v. Nevada County*, 824 F.2d 735, 737-38 (9th Cir. 1987).

[3] Austin did not seek a variance from the zoning ordinance or compensation in the state courts. He argues that these failures should not render his claim unripe. He claims that he received a final determination when the city refused to buy the land. Austin contends also that, because the State does not afford an adequate remedy by which he can be compensated, the ripeness analysis of *Williamson County* does not apply.

We need not address Austin's assertion that he was given a final determination from the city. Regardless of our conclusion on that issue, Austin's claim is not ripe for review in federal court because he failed to seek compensation through adequate state remedies.

[4] In *Williamson County* the Supreme Court recognized that inverse condemnation actions under the takings clause, like other claims under the Constitution, are not ripe for review in federal court until the plaintiff establishes that the state failed to remedy the alleged violation. 473 U.S. at 194-195 (analogizing to *Parratt v. Taylor*, 451 U.S. 527 (1974) which held that claimants must pursue state remedies before bringing federal action under the due process clause.) In an inverse condemnation action, the property owner must show that he or she sought just compensation and that the state denied it. "[N]o constitutional violation occurs until just compensation has been denied." *Williamson County*, 473 U.S. at 194 n.13.

Austin argues that his failure to seek compensation under state law should not render his claim unripe because state procedures are not "reasonable, certain, and adequate," as *Williamson County* requires.[2] He bears the burden of estab-

[2]This Court has stated in dictum that the adequacy of state remedies is an issue to be decided by the district court. *Norco Const. Inc. v. King*

lishing that state remedies are inadequate. *See Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986).

Since the Court decided *Williamson County*, several federal courts have considered whether its holding applies when state law is unclear or undeveloped. *See, e.g., Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Lerman v. City of Portland*, No. 85-0374-P (Dec. 11, 1987), — F. Supp. — (D. Me. 1987); *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986). These courts have applied *Williamson County* despite the uncertainty of state law, even when state courts have expressed unwillingness to award damages in inverse condemnation actions. *See, e.g., Littlefield*, 785 F.2d 596, 609 (8th Cir. 1986). The First Circuit noted in *Culebras*: "Lack of clarity is not unusual . . . when legal rights are still in process of definition through case-by-case adjudication." *Culebras*, 813 F.2d at 514.

The Hawaii Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I, § 20. Austin points to state court decisions denying compensation for takings of vested rights and foregone development costs. He contends that these show that state courts will not award compensation under the constitutional provision. He notes also that neither the Hawaii Supreme Court nor the state legislature has recognized inverse condemnation as a cause of action.

[5] After reviewing Hawaii court decisions, we are unconvinced that Austin may not seek compensation under his state's constitutional provision. Although we find no case that

County, 801 F. 2d 1143, 1146 (9th Cir. 1986). Because the issue of ripeness affects our jurisdiction to hear this claim, and because that statement is dictum, we decline to follow *Norco*.

recognizes inverse condemnation as a cause of action, neither do we find one that rejects it.[3] Until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances, Hawaii procedures are adequate within the terms of *Williamson County* and Austin's failure to use them cannot be excused. *Cf. Furey v. City of Sacramento,* 780 F.2d 1448, 1450 n.1 (9th Cir. 1986) ("[t]he California Supreme Court made clear that Furey's only remedy in a state court action would be 'declaratory relief or mandate precluding the application of the subject land-use regulations.' ") (citations omitted); *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1517 (11th Cir. 1987) ("equitable relief is the exclusive [state] remedy available to a property owner injured by virtue of a confiscatory zoning regulation.")

Austin contends next that *Williamson County* should not apply to his action because we have noted previously that it does not apply to cases involving physical takings. *See Hall v. City of Santa Barbara,* 833 F.2d 1270, 1281 n.28 (9th Cir. 1986). Austin claims that this case involves a physical taking.

[6] We reject the argument. First, Austin has not suffered a physical taking of his land. He retains title and possession. The city has not intruded on the setback, nor has it authorized others to do so. Austin may exclude the public, even the city, if he so chooses. " '[T]he right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." ' " *See Nollan v. California Coastal Comm'n,* 107 S. Ct. 3141, 3145 (1987) (citations omitted). Because Austin retains this right, he has not suffered a physical taking. Furthermore, the discussion in *Hall* concerned only the requirement that landowners obtain a final determination. *Hall* did not address whether landown-

[3]Nor has Austin established that there is no possibility of relief under Hawaii Revised Statutes 101-3.

ers seeking compensation for a physical taking must first pursue compensation under state law.

Austin also argues also the district court's finding that the city took his property by its oppressive conduct, rather than by oppressive regulation, renders *Williamson County* inapplicable under *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir.) *cert. denied*, 464 U.S. 847 (1983). In *Martino*, we found only that when a taking occurs through oppressive conduct, the landowner's failure to submit a plan and seek a variance from the local authority does not render the claim unripe. *Martino*, 703 F.2d at 1147. We did not consider the requirement that landowners seeking compensation under the takings clause first pursue state law remedies. Because *Martino* preceded *Williamson County*, our failure to address this requirement does not control our analysis here.

Finally, Austin contends that because the Court decided *Williamson County* a year and a half after he filed his federal action, it would be inequitable to apply it retroactively. He argues that under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), we may decline to apply a decision retroactively if doing so would impose "injustice or hardship." *Id.* at 107.

Unless a claim is ripe, we do not have jurisdiction to hear it. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-91 (1947); and *Hart and Wechsler's The Federal Courts and the Federal System*, 145-146 (2d ed. 1973). Because *Williamson County* affects our jurisdiction to hear takings claims, we must apply it retroactively. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). Contrary to Austin's assertion, we have no discretion to extend our jurisdiction to hear his claim.

Because Austin's claim is not ripe for review in federal court, neither the district court nor this court has jurisdiction to hear it. The order of the district court is vacated. We remand the case for dismissal.

APPENDIX B

Hawaii Revised Statutes (1985)

§101-3 Entry upon private property by agreement. In the event the State or a county thereof enters upon privately owned real property by authority of an agreement to acquire the real property either by voluntary action of the parties or by condemnation, the State or county is required to:

(1) Reduce the agreement in writing;

(2) File the executed written agreement promptly in the bureau of conveyances;

(3) Complete its part of the agreement, including payment in full of any money, within the period of two years immediately succeeding the date upon which the agreement is filed.

If the State or county does not so complete its part of the agreement, the State or county shall pay to the property owner, in addition to the sum due, interest of six per cent a year on the sum due commencing with the end of the term of two years, and the property owner may bring suit against the State or any county to recover the sum together with interest.

APPENDIX C

Revised Charter of the City and County of Honolulu 1973 (1984 Ed.)

Section 6-909. Powers, Duties and Functions—The zoning board of appeals shall:

(a) Hear and determine appeals from the actions of the director of land utilization in the administration of the zoning and subdivision ordinances and any rules and regulations adopted pursuant thereto. An appeal shall be sustained only if the board finds that the director's action was based on an erroneous finding of a material fact, or that the director had acted in an arbitrary or capricious manner or had manifestly abused discretion.

(b) Hear and determine petitions for varying the application of the zoning ordinance with respect to a specific parcel of land and may grant such a variance upon the ground of unnecessary hardship if the record shows that (1) the applicant would be deprived of the reasonable use of such land or building if it were used only for the purpose allowed in that zone; (2) the request of the applicant is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and (3) the use sought to be authorized by the variance will not alter the essential character of the locality nor be contrary to the intent and purpose of the zoning ordinance.

The board shall specify the particular evidence which supports the granting of a variance.